THE YALE LAW JOURNAL

Subscription price $5.00 per year *This number, $1.00*

Canadian subscription price $5.50 per year; Foreign, $5.75 per year; for prices on other issues inquire

Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.

THE STATUTORY INJUNCTION AS AN ENFORCEMENT WEAPON OF FEDERAL AGENCIES*

Federal statutes regulating business have created a widespread category of "white-collar crimes," such as failure to pay minimum wages or violation of brokerage requirements, which seldom incur the taint of moral depravity normally attached to criminal activity.[1] A jury may hesitate to find that even intentional failure to comply with statutory wage standards makes a criminal of a businessman whom they know as a pillar of the community and Chairman of the local Red Cross.[2] Since criminal prosecution may often be

* The specialized field of anti-trust lies beyond the scope of this Comment, as do administrative "cease and desist" orders, and problems encountered in the state courts. Alternative sanctions will be compared with the injunction, but no independent evaluation of these weapons will be attempted.

1. See Sutherland, *Is "White Collar Crime" Crime?*, 10 AM. SOCIOL. REV. 132 (1945).

2. The Office of Price Administration found that "one of the most difficult prob-

unsuccessful or inappropriate against such offenses, alternative sanctions are necessary to enforce regulatory statutes fairly and effectively.[3]

As a preventive weapon, the traditional injunction might be well fitted, if available, to cope with violations lacking the nefarious quality that administrative officials euphemistically refer to as the "sex appeal" necessary to secure criminal conviction. Historically, however, "equity will not enjoin commission of a crime," since an alleged criminal could then be tried for contempt without a jury.[4] Although this prohibition has been so whittled away that the government can obtain such an injunction to protect "the general welfare,"[5] the remedy's applicability within this category has still been limited by the host of aphorisms which embody the prerequisites of equitable relief. But legislative provision for an injunction liberates the remedy from many of the bonds of equity by satisfying of itself conditions which the Chancellor would otherwise require to be established in each case.[6] The result is a "statutory injunction" which provides the same temporary or permanent relief as its unrevamped counterpart yet is granted more freely by the courts.

With increasing frequency during the past fifteen years, Congress has authorized administrative agencies to seek this sanction against violators of the statutes that these agencies enforce. Provisions therefor have been included in acts such as those establishing the Securities and Exchange Commission, the Wage and Hour Division, and the Office of Price Administration.[7] Amendments to their original statutes also furnished the weapon to

lems in this field is to combat the attitude, so prevalent in this country, that the criminal laws are made for the criminal classes and do not apply to respectable people." OPA MANUAL § 9-1702.04B(3) (1946) (this date does not refer to the year in which the Manual was published, but rather to the most recent version of the material cited).

3. This difficulty might be corrected by a system of small fines, which was suggested in 5 OPA Q. REP. 54 (1943). But federal tribunals have not yet been equipped or authorized to play the role of police courts, and, in fairness to businesses who comply with a statute, some action must be taken against minor as well as flagrant violators.

4. *See, e.g.,* Gee v. Pritchard, 2 Swanst. 402, 413 (1818). And see note 122 *infra.*

5. *E.g., In re* Debs, 158 U.S. 564 (1895) (labor strike). Equity will act to prevent irreparable injury to rights of property, even though the threatened offense is also a crime. This theory has long been construed as permitting the government to obtain injunctive relief against a "public nuisance"—an elastic concept which has recently been expanded to cover almost any situation adversely affecting "the general welfare". See Caldwell, *Injunctions Against Crime,* 26 ILL. L. REV. 259, 261-9 (1931); Note, 5 A.L.R. 1474 (1920). For criticism of this expansion, see articles cited in note 121 *infra.*

6. See pp. 1026-7 *infra.* To be constitutional as an extension of equity, it seems probable that statutory provision for an injunction must still rest on grounds that violation of the act affects the "general welfare". See Caldwell, *supra* note 5 at 278; *cf.* 4 POMEROY, EQUITY JURISPRUDENCE § 1349 (5th ed. 1941). But conclusive deference may be accorded any reasonable legislative determination to that effect. *E.g.,* Mugler v. Kansas, 123 U.S. 623, 660-1 (1887) (liquor a public nuisance).

7. Securities Act of 1933, 48 STAT. 86 (1933), 15 U.S.C. § 77t(b) (1940); Securities Exchange Act of 1934, 48 STAT. 899 (1934), 15 U.S.C. § 78u(e) (1940); Fair Labor Standards Act of 1938, 52 STAT. 1069 (1938), 29 U.S.C. § 217 (1940); Emergency Price

the Federal Trade Commission, the Federal Security Administrator, and the National Labor Relations Board.[8] At first glance the threat of a mere judicial order of compliance, without penalties for past violations, might not seem likely to return many potential violators to the paths of righteousness. But the statutory injunction has proved extremely useful to administrative agencies; it provides a sanction which is commensurate with all but flagrant violations and may be applied without depriving the defendant of his essential protections. Necessary to an understanding of this weapon's increasing importance and of the problems raised by its modification of equity principles is evaluation of the crucial characteristics of availability and effectiveness which shape its role in the enforcement arsenal.

AVAILABILITY

Major advantages of the statutory injunction as an enforcement weapon are the ease and speed with which it may be obtained. Judicial criteria for its issuance, which have been strikingly parallel for all agencies despite extensive differences in the various grants of authority,[9] are sufficiently flexible to render the injunction more readily available than most other sanctions at the agency's disposal.

Control Act of 1942, 56 STAT. 33 (1942), as amended, 50 U.S.C. APP. § 925(a) (Supp. 1946) (all hereinafter referred to by U.S.C. number only). *See* Bowles v. Hudspeth, 62 F. Supp. 803 (D. Ore. 1945): "One of the modern miracles is the utilization of the statutory injunction by every Government agency as a means of enforcing its legislation."

Emphasis will be placed here on these agencies and the three mentioned in note 8 *infra*, since their experiences typify those of other agencies armed with the statutory injunction. Among the latter are the Market Administrator of the Department of Agriculture, 50 STAT. 246 (1937), 7 U.S.C. § 608a(6) (1940), and the Civil Aeronautics Board, 52 STAT. 1025 (1938), 49 U.S.C. § 647 (1940). The Interstate Commerce Commission possesses similar authority under the Motor Carrier Act, 1935, 49 STAT. 564 (1935), 49 U.S.C. § 322(b) (1940), but the injunction authorized by the Interstate Commerce Act, 34 STAT. 591 (1906), 49 U.S.C. § 16(12) (1940), is more akin to a judicial decree enforcing "cease and desist" orders issued after formal agency proceedings.

8. The Wheeler-Lea Act, 52 STAT. 114 (1938), amended the Federal Trade Commission Act, 38 STAT. 717 (1914), to give the FTC power to seek a temporary injunction against false advertising or misbranding of food, drugs, and cosmetics, 15 U.S.C. § 53 (1940). The 1938 Federal Food, Drug, and Cosmetic Act, 52 STAT. 1043 (1938), 21 U.S.C. § 332 (1940) (administered by the Federal Security Administrator), added the injunction to the previous Act's sanctions. The Taft-Hartley Act, 61 STAT. 146 (1947), 29 U.S.C.A. § 160 *(j), (l)* (Supp. 1947), made a temporary injunction against unfair labor practices available pending final NLRB decision (these statutes are hereinafter referred to by U.S.C. section number only).

9. The Securities Act, 15 U.S.C. § 77t(b), and the Securities Exchange Act, 15 U.S.C. § 78u(e), authorize the SEC to seek an injunction against anyone who "is engaged or about to engage" in violative acts, and admonish the courts that "upon proper showing" an injunction shall be granted. This is a far cry from the Emergency Price Control Act's mandate that "upon a showing by the Administrator that such person has engaged or is about to engage in any such [violative] acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 50 U.S.C.

Showing required.

While an agency must establish the applicability of its statute [10] and either past, existing, or imminent violation thereof,[11] statutory provision for an injunction materially modifies the showing traditionally demanded of plaintiffs seeking such a decree in equity. The courts have held that legislative authorization disposes of the requirement that lack of adequate remedy at law be alleged.[12] A showing that "irreparable injury" threatens is usually unnecessary, although some courts cautiously cite prospective danger to "the public interest" as grounds for granting a decree.[13] And a showing by the agency that its statute prescribes a special procedure for challenging a

---

APP. § 925(a) (Supp. 1946). With ingenious judicial statesmanship, courts have equated these two provisions by (a) holding that mere past violation justifies issuing an injunction to the SEC because it gives rise to an inference of future violation (see note 19 *infra*), and (b) reading judicial discretion into the apparently mandatory OPA provision (see note 17 *infra*). The Fair Labor Standards Act provision that federal courts "shall have jurisdiction, for cause shown, . . . to restrain violations," 29 U.S.C. § 217, has been similarly interpreted, as have most of the other statutes cited in notes 7 and 8 *supra*.

Legislative approval of extending the SEC provisions may be inferred from the "mandatory" clauses later included in the SEC-administered Investment Companies Act, 54 STAT. 842, 15 U.S.C. § 80 a-41 (e) (1940), and Investment Advisers Act, 54 STAT. 853, 15 U.S.C. § 80 b-9 (e) (1940).

10. *E.g.*, Walling v. Northwestern-Hanna Fuel Co., 67 F. Supp. 833 (D. Minn. 1946) (Wage and Hour). But the defendant bears the burden of proving that he comes within an authorized exemption, Walling v. Morris, 155 F.2d 832 (C.C.A. 6th 1946), SEC v. Sunbeam Gold Mines Co., 95 F.2d 699 (C.C.A. 9th 1938), or that classification of his product was erroneous, United States v. Ridgeland Creamery Co., 47 F. Supp. 145 (W.D.Wis. 1942) (Agricultural Market Administrator).

11. *E.g.*, SEC v. Macon, 28 F.Supp. 127, 130 (D.Colo. 1939) (past violation). A temporary injunction usually is denied where there are sharp issues of fact, *e.g.*, Bowles v. Bernstein, 66 F.Supp. 361 (S.D.N.Y. 1945) (OPA). *But cf.* the Taft-Hartley Act, 29 U.S.C.A. § 160 (j) (1) (Supp. 1947), where the criterion seems to be only whether there is "reason to believe" that certain proscribed unfair labor practices exist. *See* Douds v. Local 294, International Brotherhood of Teamsters, 75 F. Supp. 414, 418 (N.D.N.Y. 1947) (NLRB).

12. This principle has been universally applied by the federal courts. *E.g.*, SEC v. Jones, 85 F.2d 17 (C.C.A. 2d 1936), *cert. denied*, 299 U.S. 581 (1936). Courts which still term the statutory injunction an "extraordinary remedy" apparently refer not to this traditional requirement but to their discretionary power to deny relief. *See, e.g.*, Walling v. Clinchfield Coal Corp., 159 F.2d 395, 399 (C.C.A. 4th 1946).

13. *E.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (anti-trust); Henderson v. Burd, 133 F.2d 515 (C.C.A. 2d 1943) (OPA); Fleming v. Salem Box Co., 38 F. Supp. 997 (D.Ore. 1940) (Wage and Hour). Occasionally a court will grant a decree on the basis of irreparable injury, as in FTC v. Thomsen-King & Co., 109 F.2d 516, 519 (C.C.A. 7th 1940). A few courts have invoked this requirement to bar a temporary mandatory injunction which would afford complete relief, as in United States v. Adler's Creamery, 107 F.2d 987 (C.C.A. 2d 1939) (but permanent mandatory injunction subsequently granted to Market Administrator without such showing, 110 F.2d 482 (1940), *cert. denied*, 311 U.S. 657 (1940)). *Contra:* United States v. Andrews, 26 F. Supp. 123 (D. Mass. 1939).

regulation's validity curbs judicial power to deny injunctive relief on grounds that the regulation imposes undue hardship.[14]

But the tentacles of equity are not completely disengaged by statute: the agency still must show possibility of future violation, for the injunction's purpose is to prevent, not to punish.[15] Even in the face of the apparently mandatory provision in the Emergency Price Control Act for an injunction upon showing of past violation,[16] the Supreme Court held in *Hecht v. Bowles* [17] that judges retained discretion to refuse an injunction which they found unnecessary to assure the defendant's future compliance. Its affirmation of this equitable prerogative, however, was not unqualified: the Court cautioned that judges must not administer the Act grudgingly and that standards of public interest should supplant those of private litigation.[18] In line with these admonitions, courts have usually lightened the agency's burden by drawing from past violations an inference that injunctive relief is necessary to prevent future disobedience, with discretionary denial limited to cases where the defendant overcomes this inference by clearly reliable promises

14. United States v. Ruzicka, 329 U.S. 287 (1946) (impropriety of Market Administrator's order no defense, since statute prescribes appeal to Secretary of Agriculture); Pearson v. Walling, 138 F.2d 655, 657-8 (C.C.A. 8th 1943), *cert. denied*, 321 U.S. 775 (1944) (review of regulation limited to prescribed procedure); Bowles v. Meyers, 149 F.2d 440 (C.C.A. 4th 1945) (only Emergency Court of Appeals can consider validity of OPA regulation); *cf.* Yakus v. United States, 321 U.S. 414 (1944).

Another chancery doctrine that falls before a statute is equity's traditional ban against collecting debts past due: *e.g.*, Chapman v. United States, 139 F.2d 327 (C.C.A. 8th 1943) (order to pay milk producers' settlement fund held not void in equity, although exposing defendant to imprisonment for debt through contempt proceedings).

15. *E.g.*, Swift & Co. v. United States, 276 U.S. 311, 326 (1928).

16. See note 7 *supra*. Under statutes including modifying clauses like "upon proper showing" or "for cause shown", courts have ample leeway to apply discretion. But the court cannot, as in an action for a declaratory judgment, refuse to decide the issue raised. Walling v. Mid-Continent Pipe Line Co., 143 F.2d 308 (C.C.A. 10th 1944).

17. 321 U.S. 321 (1944), *reversing* 137 F.2d 689 (App.D.C. 1943). The Court maneuvered the camel of discretion through the proverbial needle's eye by holding that provision for an alternative "other order" ("a permanent or temporary injunction, restraining order, *or other order shall* be granted without bond") indicated that Congress did not intend to prohibit that traditional judicial discretion. *Id.* at 330.

Whether it would be unconstitutional for Congress to remove this prerogative completely has not yet been decided. In the Hecht case there is no clear intimation that such a modification would be barred by U.S. CONST. Art. III. Congress can prescribe penalties in actions at law, and it may be questioned whether equitable origin gives injunctive relief a perpetually sacrosanct status. On the other hand, legislative tampering with the basic equity discretion of a court created under U.S. CONST. Art. III might be held an unconstitutional restriction on judicial power. For a possible intimation to that effect, see the concurring opinion of Stone, C.J., in NLRB v. Cheney California Lumber Co., 327 U.S. 385, 390 (1946).

18. 321 U.S. 321 at 331. The value of this oft-cited phrasing was appreciated by the OPA: "The decision in the *Hecht* case did not impair the value of the injunction. . . . On the contrary, it probably strengthened this sanction. . . . The Supreme Court made it clear that the courts must assume a positive responsibility in exercising their discretion." OPA MANUAL § 9-6602.09B(2) (1946).

that violations will not recur.[19] Accompanied by such judicial cooperation, judicial discretion has provided a valuable safeguard against misuse of the remedy without seriously marring effective enforcement.

The showing by which a defendant can successfully convince the court that no injunction is necessary varies with the kaleidoscope of judicial discretion, but three fragments consistently reappear in the pattern of decisions: whether violations have been promptly and effectively discontinued, whether these violations were committed in good faith, and whether in the court's opinion a defendant's attitude and reputation lend credence to his promise of future compliance.[20]

The defendant must meet the first of these criteria by showing bona fide discontinuance of illegal activity at least prior to trial [21]—and generally before the complaint is filed [22]—or he has little prospect of escaping injunction.

19. It was by this device that the Securities Exchange Act provisions had been extended to permit injunctions despite discontinuance of violations. See note 9 *supra*. In Otis & Co. v. SEC, 106 F.2d 579 (C.C.A. 6th 1939), the court reasoned that without such an extension "the injunction provided for would be a remedy of slight efficacy. . . . The necessary investigation would nearly always have warned the dealer to desist." It flatly rejected the contrary rationale of SEC v. Torr, 87 F.2d 446 (C.C.A. 2d 1937) (temporary injunction), but even the *Torr* case may be reconciled on its facts, for there the court stressed that "the circumstances fail to support any reasonable inference" of future violation, SEC v. Torr, *supra* at 450. See note 32 *infra*.

Courts have drawn a similar inference from violations of the Fair Labor Standards Act. *E.g.*, Fleming v. Tidewater Optical Co., 35 F.Supp. 1015, 1017 (E.D.Va. 1940) (injunction granted even though no violations after *institution* of investigation); *cf.* Walling v. Fairmont Creamery Co., 139 F.2d 318 (C.C.A. 8th 1943) (violations, even though discontinued, form prima facie case precluding summary denial of injunction). And the OPA announced on the basis of its experience that "the defendant has the burden of showing, if he can, that in spite of his past violations an injunction will have no tendency to lessen the chance that he will violate." OPA MANUAL § 9-6602.09C(6) (1946).

20. Although these criteria will be treated separately for purposes of presentation, many of the cases cited involve all three questions. Decisions depend on the degree to which each condition is established and the weight attached thereto by the court. Certain agencies deal with problems which are not subject to criteria of discontinuance or past good faith: the NLRB and FTC, for example, presumably would not seek a temporary injunction where the illegal activity had been effectively discontinued, although that issue may be raised by discontinuance after the suit is initiated (see note 26 *infra*). And under the Food and Drug Act good faith is no defense (see note 35 *infra*).

21. *E.g.*, Walling v. Panther Creek Mines, 148 F.2d 604 (C.C.A. 7th 1945) (denial is reversible error). There also must be reasonable indications that the activity will not be resumed. Bowles v. Cudahy Packing Co., 154 F.2d 891 (C.C.A. 3d 1946) (no changes made to prevent recurrence); SEC v. Thomasson Panhandle Co., 145 F.2d 408 (C.C.A. 10th 1944) (violative schemes terminated, but similar promotion initiated after complaint filed). The only major exception to the rule is an irreducible minimum of violations, as in Hecht v. Bowles, *supra* note 17 (employee errors in pricing and listing).

22. Belated discontinuance savors of cessation under pressure of suit. Walling v. Helmerich & Payne, 323 U.S. 37 (1944) (after complaint filed); Fleming v. Jacksonville Paper Co., 128 F.2d 395 (C.C.A. 5th 1942), *aff'd*, 317 U.S. 564 (1943) (six weeks before complaint filed); *see* Hecht v. Bowles, 321 U.S. 321, 327 (1944). The only major exception is where the defendant so effectively changes his position that the court is convinced

Where a corporation has been dissolved under pressure of suit, the individuals responsible for its offenses or a successor organization may still be enjoined.[23] But a strong showing of voluntary discontinuance materially bolsters the defendant's promise of compliance. In actions for a temporary injunction, where the main issue is whether violations threaten pendente lite, mere discontinuance antedating the complaint may suffice.[24] A permanent injunction, while seldom averted by such a minimum showing, may similarly be denied where the last violation occurred long before litigation commenced or where the practice was discontinued promptly upon warning by the agency.[25] Even in the absence of such alacrity, a defendant may avoid judicial prohibition by a showing that he has "effectively" altered his position and adopted measures "adequate" to insure compliance—criteria sufficiently vague to give the court wide leeway in determining whether its mandate is necessary to forestall possible resumption of illegal activity.[26]

---

he will comply. See note 26 *infra*. An OPA injunction was not necessarily barred by amendment of a regulation which raised the ceiling above the previously violative price, on the grounds that possible violation of the new provisions might be indicated. Bowles v. May Hardwood Co., 140 F.2d 914 (C.C.A. 6th 1944) (but injunction was subsequently denied; see note 40 *infra*); *cf.* FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257 (1938) ("cease and desist" order). *Contra:* Bowles v. Swift & Co., 56 F.Supp. 679, 681 (D.Del. 1944) (reasoning of *May* case rejected). But termination of a statute precludes an injunction, for there is nothing left to violate.

23. Bowles v. Carothers, 152 F.2d 603 (C.C.A. 5th 1945), *cert. denied*, 328 U.S. 859 (1946) (business sold); Fleming v. Southern Kraft Corp., 43 F.Supp. 541 (S.D.N.Y. 1942) (merger); *cf.* Walling v. James V. Reuter, Inc., 321 U.S. 671 (1944).But dissolution remains an indication that violations will not recur. See note 26 *infra*.

24. "If violations have discontinued it is next to impossible to procure a temporary restraining order or a temporary injunction, unless we are able to show clearly and affirmatively that a threat to violate . . . the statute is both immediate and actual. This is most difficult to do since it involves proof of intent to violate." Communication to the YALE LAW JOURNAL from Mr. John J. Babé, Assistant Solicitor, Department of Labor, Jan. 21, 1948, in Yale Law Library.

25. *E.g.*, Bowles v. Carnegie-Illinois Steel Corp., 149 F. 2d 545 (C.C.A. 7th 1945) (defendant volunteered information on activities to OPA and discontinued them promptly when told they were in violation); Walling v. T. Buettner & Co., 133 F.2d 305 (C.C.A. 7th 1943), *cert. denied*, 319 U.S. 771 (1943) (company replaced and completely ceased using home-workers 81 days before suit entered); SEC v. Downs, 1 S.E.C. Jud. Dec. 135 (D. Colo. 1936) (last alleged violation occurred seven months before complaint filed).

26. New labor contracts conforming to the Fair Labor Standards Act are considered conclusive evidence that the defendant will not again violate. *E.g.*, Walling v. Shenandoah-Dives Mining Co., 134 F.2d 395 (C.C.A. 10th 1943) (violations over three-year period terminated by new contract six months after suit initiated); *cf.* Douds v. Wine, Liquor & Distillery Workers Union, 75 F.Supp. 447, 452 (S.D.N.Y. 1948) (NLRB; labor dispute settled after petition filed). Practical steps to prevent recurrence of violations also may offset delay, Walling v. Associated Truck Lines, 57 F.Supp. 943 (W.D.Mich. 1944), as may leaving the business completely, Bowles v. Minish, 56 F.Supp. 153 (S.D.Ala. 1944). But the latter changes are far from conclusive, particularly where previous violations were committed in bad faith. See cases cited in note 23 *supra*, and SEC v. Lawson, 24 F.Supp. 360, 365 (D.Md. 1938) (defendant enjoined even though he dissolved broker-

An equally important criterion, even though "willfulness" need not be established,[27] is whether past violations were committed in good faith.[28] The "second offender" against whom judicial prohibition was previously denied has little chance of escaping with continued immunity.[29] Where the defendant's promise of compliance need endure only for the short span of a temporary injunction, requirements of good faith may be satisfied if the infraction was unintentional.[30] But for a permanent injunction the standard is high. While subjective good faith is important, the best of intentions must be bolstered by objective indicia of reasonable efforts to insure compliance. Thus the defendant must show that he has been diligent to ascertain the correct interpretation of the statute or regulation,[31] and reliance on unauthorized advice given by agency subordinates will not be accepted as sufficient *per se*.[32] In addition, practical steps must have been taken to carry out the regulatory mandate.[33] Where good faith is thus established, however, the novelty or complexity of a regulation may lead the court to excuse minor infractions,[34]

age business and paid debts after complaint filed; "there is no legal obstacle to his [resuming business], however clear his present intention may be to the contrary.").

27. In the field of regulatory legislation, at least, requirements of willfulness may be satisfied where violation is "intentional" rather than "accidental", and no "evil purpose" need be shown. *E.g.*, Zimberg v. United States, 142 F.2d 132, 138 (C.C.A. 1st 1944), *cert. denied*, 323 U.S. 712 (1944). When willfulness is thus established, an injunction almost invariably issues. *E.g.*, Bowles v. Weitz, 64 F.Supp. 829 (W.D. Pa. 1946). The one exception would be denial based on effective discontinuance *per se*. See note 26 *supra*.

28. Good faith may not be decisive, but "if made manifest, it may be a substantial element to be considered." Bowles v. Huff, 146 F.2d 428, 431 (C.C.A. 9th 1944).

29. *E.g.*, Castle v. Walling, 153 F.2d 923 (C.C.A. 5th 1946).

30. *E.g.*, Bowles v. Cunningham, 61 F.Supp. 162 (W.D.Pa. 1945). *But see* Henderson v. C. Thomas Stores, 48 F.Supp. 295, 303 (D.Minn. 1942).

31. Bowles v. Lenko, 64 F.Supp. 592 (W.D.Pa. 1946) (never communicated with OPA to determine proper rentals); *cf.* Walling v. Kerr, 47 F.Supp. 852 (E.D.Pa. 1942) (injunction granted where defendant failed to comply with wage order for industry though Administrator previously failed to advise of status upon request). But such agency errors are a factor in determining a defendant's good faith. *E.g.*, Bowles v. Arlington Furniture Co., 148 F.2d 467, 472 (C.C.A. 7th 1945) (OPA failed to make pre-sale inspection as requested).

32. Such misplaced reliance, without following the prescribed interpretative procedure, may be held an enjoinable failure to exercise practical precautions, Bowles v. Sago, 65 F.Supp 178 (W.D.Pa. 1946). Erroneous advice by an agency subordinate, however, may count heavily in favor of the defendant. Apparently this was an important factor in SEC v. Torr, 87 F.2d 446, 449 (C.C.A. 2d 1937) (temporary injunction denied; see note 19 *supra*), but, notwithstanding, a permanent injunction was subsequently granted, 22 F.Supp. 602, 612 (S.D.N.Y. 1938).

33. *E.g.*, Bowles v. 870 Seventh Avenue Corp., 150 F.2d 819, 823 (C.C.A. 2d 1945), *cert. denied*, 326 U.S. 780 (1946) ("negligence of its employees on repeated occasions in adherence to price ceilings seems to us to have required injunctive relief."); Bowles v. Pechersky, 64 F.Supp. 641 (W.D.Pa. 1946) (injunction warranted by ½¢ overcharge on soup, despite neighborhood grocer's belief he was complying); Bowles v. Sneider, 62 F.Supp. 916 (D.Mass. 1945). *But cf.* Bowles v. McCrady Construction Co., 64 F.Supp. 582 (W.D.Pa. 1946).

34. Walling v. Clinchfield Coal Corp., 159 F.2d 395 (C.C.A. 4th 1946) (substantial

and a minimum of unavoidable violations will not warrant an injunction.[35]

Personal elements in each situation comprise a third category of considerations materially affecting the court's exercise of its discretion. Even where discontinuance and past good faith are established, a promise of compliance invariably will be vitiated by unyielding refusal to accept the correct interpretation of a regulation or by over-aggressive litigation.[36] On the other hand, the trustworthiness of the defendant is apparently a decisive factor in borderline cases, even though the judge's confidence in the defendant's reliability cannot alone justify denial of an injunction.[37] Similarly, while hardship in compliance theoretically may not enter judicial calculations unless the validity of a regulation is at stake,[38] courts frequently "balance the equities" in the sense of considering whether future violation is sufficiently

---

compliance with confusing regulation, and good faith effort to determine meaning); Bowles v. Virginia Hotel, 55 F.Supp. 1013 (W.D.La. 1944) (diligent efforts to comply); Walling v. Gulf States Paper Corp., 53 F.Supp. 619 (N.D.Ala. 1942), *aff'd*, 143 F.2d 301 (C.C.A. 5th 1944) (in relation to total activity, violations "so small as not to form a proper basis for an injunction."). A company may escape injunction where violations by subordinates were directly contrary to instructions of its officers and action has been taken to prevent recurrence. Walling v. Woodruff, 49 F.Supp. 52 (M.D.Ga. 1942). But mere instructions, without any effort to enforce them will not suffice. Lenroot v. Interstate Bakeries Corp., 146 F.2d 325 (C.C.A. 8th 1945).

35. *E.g.*, Hecht v. Bowles, 321 U.S. 321 (1944); Bowles v. Weiss, 66 F.Supp. 366, 370 (W.D.Pa. 1946) (injunction "would have no effect by way of insuring better compliance" because defendants doing best they can). The single exception is an injunction under the Federal Food, Drugs and Cosmetics Act, as in United States v. Lazere, 56 F.Supp. 730 (N.D.Iowa 1944) (no defense that defendant doing best he can; Congress lays down absolute prohibition).

36. A number of variations on this theme are found in Walling v. Helmerich & Payne, 323 U.S. 37 (1944); SEC v. Okin, 139 F.2d 87 (C.C.A. 2d 1943); Walling v. Hamner, 64 F. Supp. 690 (W.D. Va. 1946); Walling v. Builders' Veneer & Woodwork Co., 45 F.Supp. 808 (E.D. Wis. 1942). At the same time, an injunction is less likely to issue when the defendant is clearly willing to abide by the court's decision as to the legality of a practice. *Cf.* Walling v. Bibb Manufacturing Co., 6 Wage Hour Cases 273 (M.D. Ga. 1946) (court declared activity illegal but denied injunction because satisfied that defendant would comply).

37. Courts occasionally reveal how important this usually implicit motivation can be. *See* Lenroot v. Kemp, 153 F.2d 153 (C.C.A. 5th 1946), *reversing* 59 F.Supp. 605 (S.D.Miss. 1945). The trial judge had expatiated, "Ordinarily, the violations in this case have been such as would require the issuance of an injunction. However, having seen the defendants . . . and knowing their . . . reputation for substantial, outstanding citizens of the state, I cannot believe that these men will violate this law in the future." *Id.* at 156. But the appellate court bluntly emphasized that judicial respect for the defendant cannot alone forestall an injunction.

Conversely, a defendant's reputation may be such that a court feels he cannot be trusted to comply. *See* Koeppe v. SEC, 95 F.2d 550, 553 (C.C.A. 7th 1938) ("contrite heart" and promises to comply need not be, and are not, believed), and Walling v. Peavy-Wilson Lumber Co., 49 F.Supp. 846, 894 (W.D.La. 1943) ("Though we . . . recognize the fine executive virtues of the present head of the company, we believe that because of his temperament and disposition it would be better to issue the writs.").

38. See note 14 *supra*.

probable to outweigh an injunction's potential injury to the defendant's reputation.[39] Sympathy for struggling businessmen looms large in the *ratio decidendi* when a judge is hostile to the statute or distrusts the "all-powerful Administrator." [40]

While variations in each case preclude inexorable rules as to when an injunction will be granted, these three criteria which the defendant must meet have shaped judicial discretion to make a statutory injunction available to the agency within reasonable limits.[41] A highly important by-product of this availability has been the willingness of defendants in a vast majority of cases to consent to entry of a decree, thereby obviating full-dress litigation.[42]

39. Equities in the traditional sense theoretically cannot be weighed, U.S. v. San Francisco, 310 U.S. 16 (1940), but it would be naive to assume that they do not enter into judicial calculations. *Cf.* Bowles v. Trunz, 66 F.Supp. 363 (E.D.N.Y. 1945) (court cannot consider fairness of regulation, but temporary injunction denied in the "interests of justice"). Courts frequently repeat the axioms that "the equities must favor the plaintiff" and that "more good than harm" must result to justify issuance of an injunction, but in most cases these issues seem to boil down to whether the judge finds a "reasonable likelihood of violations in the future." *E.g.*, Walling v. Gulf States Paper Corp., 53 F.Supp. 619, 624 (N.D.Ala. 1942), *aff'd*, 143 F.2d 301 (C.C.A. 5th 1942); *cf.* Brown v. Purvin, 52 F.Supp. 348, 349 (S.D.N.Y. 1943). A kindred equitable axiom, "he who seeks equity must do equity," was invoked as a ground for denying an injunction in Walling v. McCracken County Peach Growers Ass'n, 50 F.Supp. 900 (W.D.Ky. 1943). And in Bowles v. Elzea, 59 F.Supp. 1012 (S.D.N.Y. 1945), the court considered seriously, but rejected the contention that the OPA came into court with "unclean hands". While these axioms persist, they have seldom changed the course of decision.

40. Walling v. Lacy, 51 F.Supp. 1002, 1005 (D.Colo. 1943) (widow operating small printing shop promised tearfully to comply, and "surely the all-powerful Administrator could ask for nothing more."); and *see* Walling v. T. Buettner & Co., 133 F.2d 306, 308 (C.C.A. 7th 1943) (reversing issuance of injunction), *cert. denied*, 319 U.S. 771 (1943): "Employers . . . should not be harassed by the processes of a court of equity coercing them to do what they are willing to do and trying to do voluntarily." The OPA also received its share of verbal lashings: *see* Porter v. Rushing, 65 F.Supp. 759, 760 (W.D. Ark. 1946) ($9 rent overcharge in year held *de minimis*): the court must "prevent the over-zealous agent . . . of the government from using the temporary authority lodged in him as an instrument of oppression of the weak."

41. Even where an injunction is denied, the court may afford lesser relief. *E.g.*, Bowles v. C.S.Smith Metropolitan Market Co., 59 F.Supp. 895 (S.D.Cal. 1945) (order to employ additional inspectors). A common practice was to hold an OPA case on the docket, with leave granted the Administrator to move for an injunction if the defendant violated during a prescribed period. *E.g.*, Bowles v. May Hardwood Co., 155 F.2d 264 (C.C.A. 6th 1946). And in Walling v. Florida Hardware Co., 142 F.2d 444 (C.C.A. 5th 1944), the defendant was given 30 days to correct its faulty system of keeping wage records; upon compliance within that time, an injunction was denied.

42. In the fiscal year 1945, for example, 83% of the 417 injunctive actions under the Fair Labor Standards Act and 79.6% of the 20,565 OPA civil cases (of which the large majority were for injunctions) resulted in consent decrees. ANN. REP. DIR. ADM. OFF. U.S. COURTS 51 (1945). But the percentage may diminish as a program matures. See note 120 *infra*.

The judge is not required to enter an unjustified consent decree, Bowles v. Huff, 146 F.2d 428 (C.C.A. 9th 1944), but he cannot vacate such a decree without expression of dissatisfaction by the parties, Bowles v. Dodge, 141 F.2d 969 (C.C.A. 9th 1944), and any

As a result, most agencies have been successful in more than 95 percent of their completed injunctive actions.[43]

As with the issuance of an injunction, the scope of the decree which is available depends on the court's discretion.[44] Recognizing the agencies' need

right of subsequent challenge to its scope is considered waived by consent. SEC v. Jones, 85 F.2d 17 (C.C.A. 2d 1936), *cert. denied*, 299 U.S. 581 (1936).

In addition to the difficulty of persuading the court to deny an injunction, two other factors may influence the defendant to accept a consent decree. (1) "The shame resulting from this order is sometimes mitigated and the corporation's face saved by taking a consent decree. The corporation may insist that the consent decree is not an admission that it violated the law." Sutherland, *Is "White Collar Crime" Crime?*, 10 AM. SOCIOL. REV. 132, 135 (1945). (2) He may feel that he is escaping heavier penalties. The Wage and Hour Administrator, for instance, may refrain from seeking an injunction against interstate transportation of "hot goods" produced by underpaid workers (see 29 U.S.C. § 217) if the defendant consents to a decree ordering compliance and repays back wages. 2 MLS 90:101.

43. This percentage excludes withdrawals by the agencies but includes consent decrees:

OPA injunction suits (1942–May 1947, 22 OPA Q. REP. 17):

Preliminary injunctions granted	2,970	93.8%
Permanent injunctions granted	48,899	
Total denied	1,606	
Withdrawn	16,359	

Wage & Hour (1938–June 1946, figures supplied by Dept. of Labor):

Won (permanent & preliminary)	4,741	97.9%
Lost " "	95	
Withdrawn	142	

Statistics indicate, however, that in contested cases the agency's record may be far less imposing, as in the fiscal year 1941, ANN. REP. W. & H. DIV. 60 (1941):

Granted after contest	10	59%
Denied after contest	7	
Issued by consent and default	1,595	
Withdrawn	7	

SEC (1933–June 1947, figures supplied by SEC) (precise disposition is included to show the various possible fates of an injunction):

Judgment by Consent	959
" by Court	142
" Pro Confesso	32
" by Default	33
Total issued	1166
Judgment denied	7
Abated	1
Vacated	11
Prosecution stayed on stipulation to discontinue violation	3
Settled by Stipulation	5
Dismissed	248
Discontinued	6
Abandoned	27
Total instituted but not issued	308

44. Appellate courts are particularly loath to substitute their discretion on "scope"

for an order sufficiently broad to prevent evasion, courts have usually cooperated by prohibiting all violations found to be of the "general type" previously committed or "fairly anticipated," [45] though on occasion judicial foresight as to what might be anticipated has seemed somewhat myopic.[46] But judges understandably object to omnibus decrees which unduly expose the defendant to contempt proceedings; accordingly, statute-wide injunctions are granted only where bad faith is evident or "the public interest" requires drastic action.[47]

Availability relative to that of other sanctions.

The limited showing necessary for a statutory injunction and the speed with which such relief may be obtained make it much more versatile than other weapons in the enforcement arsenal. As a milder remedy requiring no proof of "willfulness",[48] its availability is accentuated in comparison with that of criminal prosecution.[49] An injunction avoids the uncertainties of

---

for that of the original tribunal. *E.g.*, Bowles v. Town Hall Grill, 145 F.2d 680 (C.C.A. 1st 1944) (see note 46 *infra*). For a more complete treatment of "scope" than is possible here, see Note, 54 YALE L. J. 141 (1944).

45. Prescribed for "cease and desist" orders in NLRB v. Express Publishing Co., 312 U.S. 426, 437 (1941), and May Department Stores Co. v. NLRB, 326 U.S. 376 (1944), these criteria also govern the scope of injunctions. *E.g.*, Bowles v. Luster, 153 F.2d 382, 384 (C.C.A. 9th 1946). But the anti-trust injunction recently upheld in International Salt Co. v. United States, 68 S.Ct. 12, 18 (1947), indicates that at least in this related field some courts are willing to grant decrees broad enough to bar every major evasive device.

46. A leading example is the notorious "chicken, lobster, and gin" case, where the appellate court refused to broaden a decree beyond the three items on which a restaurant had violated price ceilings. Bowles v. Town Hall Grill, 145 F.2d 680 (C.C.A. 1st 1944). And *cf.* Walling v. Sternberg Dredging Co., 64 F.Supp. 758 (E.D.Mo. 1946) (decree limited to group of employees previously underpaid); Porter v. Lux, 157 F.2d 756 (C.C.A. 9th 1946) (injunction of limited duration, with clause permitting OPA to prove subsequent need for extension).

47. *See* Fleming v. Jacksonville Paper Co., 128 F.2d 395 (C.C.A. 5th 1942), *aff'd*, 317 U.S. 564 (1943) (statute-wide injunction modified—a factor responsible for defendant's subsequent acquittal of contempt, 69 F.Supp. 599 (S.D.Fla. 1947)). But flagrant violations lead courts to anticipate infraction of unrelated provisions of the statute. *E.g.*, Bowles v. Montgomery Ward, 143 F.2d 38 (C.C.A. 7th 1944) (statute-wide injunction). Whether failure to keep price records would justify injunction against price violations was a bone of contention: *Compare* Bowles v. Leithold, 155 F.2d 124 (C.C.A. 3d 1945), *cert. denied*, 327 U.S. 794 (1946) (granted where violations willful) *with* Bowles v. Sacher, 146 F.2d 186 (C.C.A. 2d 1944) (denied; no mention of willfulness).

48. For conviction under most regulatory statutes, willfulness must still be established. *E.g.*, Securities Exchange Act, 15 U.S.C. 78ff(a) (1940). See note 27 *supra*. A rare exception is the Federal Food, Drugs, and Cosmetics Act, 21 U.S.C. § 333, under which intent is "no part of the crime" even though it opens the door to higher penalties. Triangle Candy Co. v. United States, 144 F.2d 195, 199 (C.C.A. 9th 1944). But in any event the difficulty of convicting reputable citizens makes "willfulness" an obstacle much greater than its current definition would indicate. See note 2 *supra*.

49. Compare the statistics on injunctions in note 43 *supra* with the following figures

jury trial and averts the possibility that an agency's case may be impaled on the spikes of criminal procedure.[49] It is entertained more promptly by the courts and under many statutes may be initiated by the agency's own legal staff, whereas criminal prosecution must await the pleasure of a United States Attorney.[51]

In some situations, moreover, injunctions may be obtained more easily than the other civil remedies authorized for certain agencies. For example, condemnation under the Food and Drug Act is permitted only after adulterated goods have entered interstate commerce, whereas an injunction may forestall their shipment. [52] License suspension under the OPA was limited in

---

on federal criminal defendants:

SEC: 1934-June 1947, 13 SEC ANN. REP. 228 (1947):

Convicted:	1,065	81.9%	(but in 89.6% of the 371 cases completed as to one or more defendants, at least one conviction has been obtained.)
Acquitted:	236		
Proceedings dismissed by U. S. Attorneys: ..	552		

OPA: 1942-May 1947, 22 OPA Q. REP. 17 (1947):

Convicted:	11,600	93.4%
Acquitted:	815	
Withdrawn:	1,500	

A major factor in OPA's record of convictions was the care with which the agency restricted prosecution to exceptionally flagrant cases. See note 108 *infra*. During the fiscal year 1945, pleas of guilty or nolo contendere were entered by 3,937 defendants, while only 520 were tried by court or jury. In these 520 cases the OPA was far less successful: 196, or 37.7%, were acquitted. ANN. REP. DIR. ADM. OFF. U.S. COURTS 57, 113 (1945).

During the same year the Wage and Hour Division instituted criminal action against 133 defendants: 90 were convicted, of whom 81 had entered pleas of guilty or nolo contendere; charges against 28 were dismissed, and 5 were acquitted. *Id.* at 113. Between Oct. 1938 and July 1946, 685 Wage-Hour prosecutions were instituted, as compared with 4,978 suits for injunction. Child Labor violations have led to prosecution in 213 cases as compared with 452 injunctive actions (statistics supplied by Dept. of Labor).

50. OPA listed six procedural criteria for choosing the sanction appropriate to a case: (1) possibility of adequate disposition; (2) questions of proof and evidence; (3) difficulty of clearing through the Department of Justice; (4) speed with which results can be obtained; (5) extent to which OPA attorneys control proceedings, see note 51 *infra*; (6) whether remedy chosen involves jury trial. OPA MANUAL § 9-1702.03 (1946). On all of these counts the injunction is procedurally more desirable. Indicative of why the agency preferred to avoid a jury is the fact that during the fiscal year 1945 43.8% of the defendants tried on OPA criminal charges by a jury were acquitted, as compared with only 21.7% of those tried by the court. ANN. REP. DIR. ADM. OFF. U.S. COURTS 57 (1945).

51. Agencies such as the Department of Agriculture have no litigating staff and must refer all cases to the Department of Justice. Attorneys for the OPA, SEC, Wage and Hour Division, NLRB, and FTC may bring civil, but not criminal, actions. See, *e.g.*, 8 SEC ANN. REP. 39 (1942), OPA MANUAL § 9-1701. This distinction is not merely academic: (1) the process of "referral" is time-consuming; (2) the OPA, for example, found that "in some areas U.S. Attorneys were reluctant to proceed, with the result that there was little or no effective enforcement in those areas." DUHL, OPA ENFORCEMENT HISTORY (unpublished document in National Archives, 1947).

52. *E.g.*, United States v. Swift & Co., 53 F. Supp. 1018 (M.D.Ga. 1943). When the

practice by its seemingly drastic nature and the delay-producing requirement of previous warning notice [53]—difficulties not encountered in seeking an injunction. OPA treble damage penalties,[54] unlike injunctions, could be secured despite decontrol of an item or certainty of future compliance,[55] but penalties were limited by difficulties of proof and a one-year statute of limitation.[56] Injunctive relief, on the other hand, could not only be invoked more promptly but could also make available ancillary restitution [57] compensating

---

adverse party is before the court, an injunction may be sought in the same suit as condemnation. *See* United States v. 184 Barrels Dried Whole Eggs, 53 F.Supp. 652, 653 (E.D.Wis. 1943) (entry of goods into interstate commerce in doubt). But condemnation is not too difficult to secure: as an "in rem" proceeding it may be promptly instituted, and no showing is required that adulteration was intentional or even that the adulterated product is injurious to health. *E.g.*, United States v. Two Bags, Each Containing 110 Pounds, Poppy Seeds, 147 F.2d 123 (C.C.A. 6th 1945).

53. 50 U.S.C.APP. § 925(f) authorized the Administrator to issue licenses for all sales subject to price control. Licenses could be suspended up to one year in a civil proceeding upon showing that the violator (1) had received an official "license warning notice" for a previous infraction, and (2) had again breached the regulation after receipt of this notice. The Administrator was not required to establish willfulness or the grounds for the warning notice, Gordon v. Porter, 155 F.2d 949 (C.C.A. 9th 1946), but the remedy was regarded as "time-consuming and awkward", 5 OPA Q. REP. 53 (1943), and was a type of action new to both courts and OPA attorneys. See, in general, OPA MANUAL § 9-1803.02 (1946). The sanction was infrequently invoked: OPA won 328 license suits, lost 66, and withdrew 442. 22 OPA Q. REP. 17 (1947).

54. See 50 U.S.C.APP. §925(e). The 1944 amendment made the previously automatic treble damages subject to the "Chandler defense" of past objective good faith, which could reduce recovery to the amount of the overcharge. Between these boundaries courts fixed the damages in their discretion. Bowles v. Goebel, 151 F.2d 671 (C.C.A. 8th 1945).

This sanction was frequently invoked by OPA and freely granted by the courts. See 22 OPA Q. REP. 17 (1947):

Adm'r's own Treble Damages suit on goods purchased "in course of trade or business" (1942-May 1947):	Adm'r's suit in place of consumer on other overcharges (authorized by 1944 Amendment) (1944-May 1947):
Won 6,303	Won 13,869
Lost 334	Lost 605
Withdrawn ..1,900	Withdrawn . 4,896

And the threat of these penalties facilitated informal disposition. In 1943 approximately 25,000 damage claims were settled, and an equal number were disposed of by "voluntary" contribution. 8 OPA Q. REP. 70 (1944).

The Market Administrator also has authority (rarely used) to recover thrice the value of fruit shipped in violation of interstate quotas. 7 U.S.C. § 608a(5).

55. See 20 OPA Q. REP. 74 (1947). Both sanctions could be sought jointly, and a finding that injunction was unwarranted did not prejudice claims for damages. *E.g.*, Star Steel Supply Co. v. Bowles, 159 F.2d 812 (C.C.A. 6th 1947). Nor were treble damages barred by previous issuance of an injunction. *E.g.*, Woodbury v. Porter, 158 F.2d 194 (C.C.A. 8th 1946).

56. 50 U.S.C. APP. § 925(e). See note 94 *infra*.

57. Porter v. Warner Holding Co., 328 U.S. 395 (1946), upheld the remedy under two theories: (1) "nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that . . . which has given rise to the necessity for injunctive relief"; (2) the OPA's "other order" clause. *Id.* at 399; see note 17 *supra*. But

for injuries prior to that one-year period and requiring less precise computation of damages by the agency.

The availability of an injunction is less marked in comparison with that of administrative sanctions such as "cease and desist" orders.[58] The agency's hearing branch will presumably be more sympathetic than many district judges toward the enforcement program, and, on judicial review, administrative findings of fact are conclusive if supported by substantial evidence.[59] But in most situations requirements of notice and hearing,[60] as well as inability to enforce some administrative orders prior to approval by the Circuit Court of Appeals, [61] create delays not present in an injunctive action. And the ancillary relief that an injunction permits can seldom be procured administratively.[62]

EFFECTIVENESS

While the ready availability of the statutory injunction aids enforcement by facilitating application of a formal sanction, the ultimate value of this

without an injunction, "such a recovery could not be obtained . . . if an adequate legal remedy were available." *Ibid.*

In contrast with OPA experience, the Wage and Hour Division has been granted ancillary restitution in only a few contested actions, *e.g.*, Walling v. O'Grady, 146 F.2d 422 (C.C.A. 2d 1944). But unless the statutory provision for double damages in suits by employees, 29 U.S.C. § 216b, is held exclusive merely because there is no specific provision for recovery by the Administrator, the first ground of the *Warner* decision seems clearly applicable. The question has not been directly raised since that opinion, but restitution is usually available in civil contempt proceedings (see note 75 *infra*), and has often been embodied in consent decrees, *e.g.*, Walling v. Miller, 138 F.2d 629 (C.C.A. 8th 1943), *cert. denied*, 321 U.S. 784 (1944). In the fiscal year 1947, such relief was secured in 14,748 cases handled administratively and in 160 consent decrees. ANN. REP. W. & H. DIV. 9 (1947).

58. See, *e.g.*, 15 U.S.C. § 45 (FTC); 29 U.S.C.A. § 160 (Supp. 1947) (NLRB). Among the other important administrative sanctions are the SEC "stop-order", 15 U.S.C. § 77 h (d), which suspends the registration statement necessary to float an issue of securities, and the SEC broker-dealer revocation order, 15 U.S.C. § 78o(b), barring a broker-dealer from over-the-counter securities transactions. For statistics on revocation orders and other broker-dealer sanctions, see 13 SEC ANN. REP. 226 (1947). Extremely useful to the OPA was the rationing suspension order which, though not specifically authorized by statute, received judicial approval as a logical extension of the power to allocate rationed commodities. L. P. Steuart & Bro. v. Bowles, 322 U. S. 398 (1944). The agency's record before its hearing branch was 41,784 cases won, 4,743 lost, and 5,864 withdrawn. 22 OPA Q. REP. 17 (1947).

59. See, *e.g.*, the Securities and Securities Exchange Acts, 15 U.S.C. §§ 77i(a), 78y(a).

60. These requirements apply to all the sanctions enumerated in note 58 *supra* (but in practice announcement of a "stop-order" hearing instantaneously halts trading in that security). In contrast, a temporary restraining order can be granted even without prior notice if irreparable injury threatens. 38 STAT. 737 (1914), 28 U.S.C. § 381 (1940).

61. This difficulty is encountered primarily with "cease and desist" orders, *e.g.*, NLRB orders, 29 U.S.C. § 160(e); see SEN. REP. No. 105, 80th Cong., 1st Sess. 8 (1947). FTC orders become final if not appealed within 60 days. 15 U.S.C. § 45. Other sanctions enumerated in note 58 *supra* are in force pending appeal, unless the court specifically grants a "stay".

62. See note 104 *infra*.

sanction must be measured in terms of its effectiveness in decreasing statutory violation.[63] Theoretically, an injunction's purpose as a preventive remedy is fulfilled if the enjoined party obeys the court's order. But as one court must have recognized when it pursued a late-lamented defendant into purgatory with an injunction issued *nunc pro tunc*, each formal sanction should perform the additional function of deterring other would-be violators as well.[64] To achieve either of these aims, an injunction must be followed by effective detection of violations and substantial punishment therefor. Fortunately, however, inadequate policing of decrees may be offset to some extent by their psychological impact, which greatly increases the remedy's total deterrent effect.

Detecting violations of injunctions.

Although a few types of infraction such as failure to submit records will come to the agency's attention automatically,[65] it must rely primarily on reinvestigation and complaints to reveal violations of injunctions. In practice the effectiveness of both methods is unfortunately limited.

Because of budgetary restrictions, few agencies have enough investigators to follow adequately the activities of all those enjoined, without reducing essential initial coverage. Although the problem is less acute where a periodic

63. Mandatory injunctions also serve the useful purpose of effecting positive action, such as preparation of records.

64. U.S. v. Paddock, 68 F.Supp. 407 (W.D.Mo. 1946) (Food and Drug). The only rational motive for this aberrational decision is to warn the public that not even ghosts can misbrand drugs with impunity. The importance of deterrent effect is indicated in Fleming v. Phipps, 35 F.Supp. 627 (D.Md. 1940), where the Wage and Hour Division dropped the customary veil of legal jargon to urge issuance of an injunction because: (1) failure to enjoin a defendant who admittedly (though unintentionally) had violated the statute would encourage others to violate; (2) the agency's appropriation was inadequate to permit effective "policing" of that industry; and (3) an injunction would assist the Administrator in subsequent litigation. But the court indignantly rejected this pragmatic approach: "The special reasons urged . . . for the injunction in this case seem to be for indirect and collateral objectives rather than in accordance with the usual equity rules. . . ." *Id.* at 630.

Nevertheless, judicial refusal to grant an injunction for the overt purpose of deterring others does not mean that courts do not consider this additional attribute of an injunction, as witness the *Paddock* case. And certainly it is uppermost in the calculations of agency officials: "We do not want to and cannot police every transaction or even handle every violation which occurs. . . . We must select those cases which will have maximum effect in bringing about better adherence to the regulations." Memorandum to OPA Regional Administrators from Chester Bowles, Jan. 31, 1945.

65. Mandatory injunctions are inherently easier to enforce. But only where the mandate directs submission of money or records to the agency itself, as with payment to the milk producers' settlement fund operated under the Market Administrator, will violation "automatically" be detected. Even there, fraudulent computation may be difficult to uncover.

Also effective is constant agency scrutiny of the medium for violation. The FTC, for example, conducts a continuous survey of advertising, and the odds are slim that

inspection is possible, like that of broker-dealers by the SEC,[65] agencies like the OPA and the Wage and Hour Division have been notoriously understaffed.[67] And even where reinvestigation is feasible, detection may still be difficult.[68]

Complaints revealing hidden violations, while useful to supplement systematic reinvestigation, are even more haphazard. Many victims fail to report violations because of indifference, collusion, or fear of economic reprisal,[69] and when regulations are complex or shifting the agency cannot educate all potential complainants to detect violation of their statutory rights.[70] Inaccurate or insignificant complaints are actively detrimental because they tie up investigative facilities better employed in planned enforcement drives.[71]

---

violation by anyone enjoined from false advertising will slip through this dragnet. See ANN. REP. FTC 61 (1946).

In an effort to make all of its "cease and desist orders" more fully "self-enforcing," the NLRB and FTC require submission of reports on steps taken to insure compliance therewith. While such a device should be highly successful in channeling investigation by these agencies, its usefulness in mass enforcement programs might be limited by the tremendous volume of reports that would be required.

66. Even the SEC must rely primarily upon complaints to detect violations of fly-by-night operators.

67. The number of OPA investigators never exceeded 3500—approximately one per county. The inadequacy of this staff was such that there was little reinvestigation early in the program. "It was felt that the mere issuance of the injunction would keep such violators in line, at least for the time being, and that it was more important to investigate other violators. Later on, . . . in order to maintain [the injunction's] effectiveness, it became necessary to check upon compliance." Communication to the YALE LAW JOURNAL from Thomas I. Emerson, formerly Deputy Administrator for Enforcement, OPA, Jan. 29, 1948, in Yale Law Library.

The Wage and Hour Division has only enough manpower to investigate annually 8% of the 550,000 establishments subject to its statute, as compared with a yearly turnover of approximately 9% among these establishments. In 1946, reinspections were sharply reduced to enable broader initial coverage by this small staff. ANN. REP. W. & H. DIV. 16, 24 (1946). But some effort is apparently made to reinspect enjoined establishments within a year.

68. For example, an overcharge on a set of underwear may be easily concealed by sleight-of-hand book-keeping, and does not arouse the publicity attendant upon a cut-rate offer of "blue-sky" mining stock.

69. See 10 OPA Q. REP. 62 (1944): "In some industries where violations are most rampant there are no complaints at all, if only because buyers are afraid that they will be cut off from supply or because the buyers are themselves guilty of inducing overceiling sales in their desire to obtain supplies." And even though unions are useful watchdogs, the Wage and Hour Division in the fiscal year 1941 found 16,980 violations through routine inspections in comparison with 14,513 discovered through investigation of complaints. ANN. REP. W. & H. DIV. 43 (1941). But only ignorance of the SEC's existence or reluctance to reveal one's gullibility would bar complaint when a stock swindle is detected.

70. OPA regulations, for example, were constantly in flux, and merchants as well as consumers often had difficulty in determining ceiling prices. See 5 OPA Q. REP. 61 (1943).

71. Each complaint must be followed by investigation, unless obviously groundless,

Wherever malfeasance is unlikely to be detected by either complaints or reinvestigation, as in the retail field under OPA, business-stopping sanctions such as license suspension may be the only enforceable prohibitions.[72] But generally detection has not been so inadequate as to result in disintegration of injunction enforcement.[73]

Penalizing violations of injunctions.

If an injunction is to be effective, the detection of violations must lead to penalties sufficiently onerous to make offenses unprofitable—a goal usually sought in civil or criminal contempt proceedings.[74] The civil remedy can compensate a victim of the violation for injuries caused thereby and can force compliance with the court's order by imprisonment or accruing fines which must terminate when that is obeyed.[75] While civil relief may also be obtained in criminal contempt proceedings, the latter differ from their civil counterpart in that unconditional penalties not terminating upon compliance can be imposed.[76] These penalties may be substantial, since contempt pro-

to avoid an appearance of lethargic enforcement. See ANN. REP. W. & H. DIV. 32 (1946). Frequently such investigations merely squander limited facilities; in 1941 only 70.6% of the wage-hour inspections pursuant to complaints revealed violations. ANN. REP. W. & H. DIV. 43 (1941). Even where complaints were warranted, the OPA found that "effective enforcement can never be achieved by hopping from one complaint to another." OPA MANUAL § 9-6602.04 (1946). Much better results were achieved by planned barrages which could "concentrate a sufficient number of trained enforcement attorneys and investigators." 9 OPA Q. REP. 68 (1944). And witness the sigh of relief heaved by the Wage and Hour Division when complaints began to decrease: "With the complaint backlog no longer a serious problem, . . . it is possible to approach the problem of national enforcement . . . on a more scientific basis." ANN. REP. W. & H. DIV. 32 (1946).

72. Violations of license suspension orders were easily detected, while in the retail field "the task of policing an injunction would be insuperable." OPA MANUAL § 9-1803.02 C(2) (1946). This difficulty was enhanced by the necessity of relying primarily on the amateur investigations of Community Price Panels to enforce retail compliance, in order to permit concentration of highly trained professional investigators on the more crucial manufacturing and wholesale levels. 7 OPA Q. REP. 83-4 (1944).

73. The shortcomings of detection facilities emphasize the truism that "in any enforcement project of considerable scope, reliance must be placed on voluntary compliance." DUHL, *op. cit. supra* note 51. *Cf.* ENFORCEMENT OF THE PROHIBITION LAWS, SEN. DOC. NO. 307, 71st Cong., 3d Sess. (1931).

74. Consideration of contempt will be limited to the framework within which agencies invoke the sanction against injunctive violators. For an analysis of the generic problem, see Comment, 57 YALE L. J. 83 (1947).

75. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911), and Comment, 57 YALE L. J. 83, 93, 100-6 (1947). Agencies are usually accorded the right to bring proceedings for civil contempt, although the agency itself is not injured. *E.g.*, Fleming v. Warshawsky & Co., 123 F.2d 622 (C.C.A. 7th 1941) (judgment for amount of unpaid wages due, although employees "voluntarily" waived payment). *Contra:* Walling v. Crane, 158 F.2d 80 (C.C.A. 5th 1946).

76. United States v. United Mineworkers of America, 330 U.S. 258 (1947); Penfield Co. v. SEC, 330 U.S. 585 (1947). Judicial confusion has frequently befogged the

visions of the Judicial Code usually replace the penal restrictions of an agency's statute with limits of sound discretion [77]—limits likely to expand under the stress of a court's ire at failure to comply with its edict. Violations of statutory injunctions have seldom resulted in exorbitant sentences, however, since judicial indignation has apparently been tempered by absence of a jury and reluctance to impose penalties exceeding those permitted in initial criminal prosecution.[78] But additional punishment may accrue from social opprobrium attached to conviction for contempt.

Both forms of contempt require proof that a specific injunctive provision has been violated [79] and neither requires a jury trial.[80] But the plaintiff in the criminal proceeding must bear a heavier burden of proof [81] and surmount

distinction between the two forms of contempt. For an effort to evaluate the manifold criteria, see Moscovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COL. L. REV. 780, 781, 809–13 (1943). The main "dichotomy" seems to be that punishment is deemed "remedial" in the civil and "punitive" in the criminal proceeding, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 451 (1911). The court has no discretion to refuse appropriate civil relief, whereas it may withhold punishment for criminal contempt. *See* Parker v. United States, 153 F.2d 66, 70 (C.C.A. 1st 1946).

77. JUD. CODE §.268 (1911), 28 U.S.C. § 385 (1940). This clause makes fines and imprisonment exclusive alternatives. Timmons v. United States, 158 F.2d 370 (C.C.A. 4th 1946) (OPA). It may be replaced by statutory provision of maximum penalties for specified offenses, but no such provision is applicable to violation of statutory injunction obtained by any agency discussed here.

78. *E.g.*, United States v. B. & W. Sportswear, 53 F. Supp. 785 (E.D.N.Y. 1943) (jail sentence denied because unavailable in initial wage-hour prosecution). At least one judge of that district has also remonstrated against lack of jury trial. Communication to the YALE LAW JOURNAL from John J. Babé, *supra* note 24. But this reluctance is merely a tendency, not a rule. In 1942 the judge who later decided the *B. & W. Sportswear* case had disregarded the same statutory provision and cracked the whip sharply: "I think an example is to be set. When they agree to comply with the decree of the court, and then violate it, it is time to stop fining them and send them to jail." United States v. Bushwick, 2 Wage Hour Cases 413, 414 (E.D.N.Y. 1942). And *see* United States *ex rel.* Brown v. Lederer, 140 F.2d 136, 139 (C.C.A. 7th 1944) (OPA), *cert. denied*, 322 U.S. 734 (1944).

Although generalization is necessarily inaccurate, it appears that jail sentences are seldom imposed and rarely exceed six months. Fines vary widely, and apparently are set with an eye on the contemnor's financial position. A small sawmill operator was fined only $150 for violating a child-labor injunction, *In re* Combs, 5 Wage Hour Cases 595 (M.D. Ga. 1945), whereas a retail food chain guilty of price violations was fined $48,000. 18 OPA Q. REP. 76 (1946). Other factors are the degree and number of violations, as in Huffman v. United States, 148 F.2d 943 (C.C.A. 10th 1945) (five "deliberate and flagrant" rent violations penalized $1,000 apiece). And see the criteria listed in United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947).

79. *See, e.g.*, Walling v. Jacksonville Paper Co., 69 F. Supp. 599 (S.D.Fla. 1947) (civil), and see note 81 *infra* (criminal). But in neither proceeding may the propriety of the injunction be challenged. Taylor v. Bowles, 147 F.2d 824 (C.C.A. 9th 1945) (civil); Porter v. Merhar, 160 F.2d 397 (C.C.A. 6th 1947) (criminal).

80. A jury trial for criminal contempt is authorized, however, under a few statutes. See note 122 *infra*.

81. In criminal contempt, the plaintiff must overcome beyond reasonable doubt a presumption of innocence. One court even refused on this ground to convict a company

greater procedural hurdles.[82] Civil contempt may also be more promptly effective where it is interlocutory in nature and therefore precludes appeal prior to completion of the original suit.[83] But despite the lesser likelihood of success in the criminal action, agencies have usually felt that its attendant penalties are necessary to punish disregard of a negative injunction.[84] To enforce mandatory decrees, however, civil proceedings are often selected where complicated questions of law make the heavier burden of proof undesirable as well as where speed is required.[85]

While contempt is the only direct sanction against violation of an injunction, independent remedies such as license suspension may also be invoked by some agencies.[86] And in spite of its inherent difficulties, criminal prosecution is sometimes preferred, especially where the defendant has violated other provisions of the statute as well as those covered by the injunction.[87] But a

president who, upon being enjoined, set up a new corporation which committed identical violations on the same premises. *In re* Storyk, 4 Wage Hour Cases 647 (D.P.R. 1944). More typical, however, is United States *ex rel.* Bowles v. Seidman, 154 F.2d 228 (C.C.A. 7th 1945) (guilty for offering to sell at violative prices although no actual sale made).

Willfulness must also be established in the criminal proceeding, but the requirement is as lax as in initial prosecution. See note 48 *supra*. *E.g., In re* De Vera, 1 Wage Hour Cases 423 (D.P.R. 1940); SEC v. Boise Petroleum Co., 1 S.E.C. Jud. Dec. 395 (D.Idaho 1937).

82. See Rule 42, Federal Rules of Criminal Procedure, and Comment, 57 YALE L. J. 83, 96 (1947). Criminal contempt must be handled by the United States Attorney or by the court itself, but this hurdle can be obviated by judicial appointment of an agency attorney as the "arm of the court". *Cf.* United States *ex rel.* Brown v. Lederer, 140 F.2d 136 (C.C.A. 7th 1944), *cert. denied*, 322 U.S. 734 (1944). And criminal as well as civil contempt proceedings may be easier to initiate than prosecution. United States *ex rel.* Bowles v. Seidman, 154 F.2d 228, 230 (C.C.A. 7th 1946). *Contra:* Bowles v. Bullock, 5 F.R.D. 147 (D.Del. 1945).

83. Taylor v. Bowles, 152 F.2d 311 (C.C.A. 9th 1945), *cert. denied*, 327 U.S. 806 (1946). Criminal contempt may be appealed immediately upon conviction. *Id* at 312.

84. For a completely negative decree, civil contempt could usually lead at most to payment of the agency's costs in bringing suit, which would seldom be an adequate penalty. See OPA MANUAL § 9-6602.10B (1946).

85. *Ibid.* The Wage and Hour Division, for example, has instituted 49 civil and 133 criminal contempt proceedings (Oct. 1938-July 1946, figures supplied by Dept. of Labor, Dec. 29, 1947; statistics on outcome of these proceedings are unavailable).

86. Since the OPA customarily issued a license warning notice whenever an injunctive action was instituted, OPA MANUAL § 9-1801.02 (1946), the violation which could justify contempt proceedings was also grounds for license suspension. See note 53 *supra*. But in most instances the OPA seems to have relied on contempt proceedings because of their greater stigma and publicity value.

An injunction *per se* constitutes grounds for the SEC to revoke a broker's license, but this combination of sanctions has been relatively infrequent. See note 110 *infra*. Violation of the injunction, however, might well be a persuasive indication that revocation is necessary even though contempt proceedings are also instituted.

87. Only those violations specifically barred by the injunction can be punished in contempt proceedings. See cases cited note 79 *supra*. Prosecution may also be preferred where the injunction's coverage of guilty parties is doubtful, as in United States v. Imperial Rug Co. (unreported; M.D. Pa. Oct. 28, 1947) (after partnership enjoined, one

contempt proceeding is usually regarded as less precarious. The relative ease with which it may be invoked,[88] the threat of high penalties, and the stigmatizing nature of the proceeding combine to make it an effective support for the injunctive order.

Deterrent effect of the injunction.

Whether an individual will violate a regulatory statute seems to depend largely on the subjective calculus of prospective gain in relation to respect for the law and fear of punishment, variables which can at best be approximated.[89] Despite the mildness of the remedy, the limited nature of detection facilities, and the occasional inadequacy of contempt penalties, an injunction apparently increases respect and fear both in those enjoined and in other potential violators.

The minute percentage of cases in which injunctions have culminated in contempt proceedings indicates that judicial prohibition appreciably reduces violation by those subject to the order, although investigative shortcomings may create an exaggerated picture of compliance.[90] While respect for the court may often be a dissuading influence,[91] the crucial factor is generally whether the potential violator *thinks* he would be detected and punished. In all probability he will overestimate the actual odds, for discovery of his previous dereliction should have enhanced his fear of detection,[92] and conviction

---

partner formed corporation which committed similar wage-hour violations), and where the judge objects to absence of a jury in criminal contempt proceedings. Communication from John J. Babé, *supra* note 24. See note 78 *supra*.

88. See notes 78, 80, and 82 *supra*. Paradoxically, the OPA's record in contempt proceedings of 82.8% (both civil and criminal, 1942–May 1947: 356 won, 73 lost, and 72 withdrawn) is lower than in criminal proceedings (93.4%; see note 49 *supra*). 22 OPA Q. REP. 17 (1947). A probable explanation, however, is that the average violation leading to contempt seems less flagrant than the carefully culled criminal cases (see OPA MANUAL 9–1702 (1946)). To preserve the integrity of the injunction, the OPA felt it necessary to press contempt charges even though the case was relatively weak. Communication from Thomas I. Emerson, *supra* note 67.

89. Each situation inevitably varies with such factors as the potential violator's motive for violating (see note 105 *infra*), his susceptibility to social pressures, and the effectiveness with which those pressures are brought to bear.

90. Only 564 contempt proceedings were instituted by OPA, in comparison with 51,869 injunctions issued (1942-May 1947). 22 OPA Q. REP. 16-7 (1947). 4,978 Wage-Hour injunctions have led to a mere 169 actions for contempt (Oct. 1938-June 1946; statistics supplied by the Dept. of Labor, Dec. 29, 1947).

91. See Caldwell, *supra* note 5 at 274: "Respectable persons and corporations will violate [regulatory] laws when they would not think of disobeying an injunction ordering compliance with them." On this score a consent decree, which is relatively painless, may have less deterent effect than an injunction granted after the defendant has contested its issuance.

92. To arguments that the threat of contempt will not deter anyone not dissuaded by fear of initial criminal prosection, Caldwell replies, "it would seem that an injunction . . . is a more effective means of controlling that defendant's actions than is the prohibi-

for contempt would not only tarnish his reputation but would also expose him to penalties of unpredictable severity.[93] These inhibitions, however, may be dissipated unless nurtured by adequate and well-publicized detection and punishment of other violators.

In contrast with the immediate threat which contempt presents to those already enjoined, the injunction itself is an exceptionally mild weapon with which to threaten a hardened miscreant. For him, sanctions not permitting a relatively free bite of forbidden fruit are necessary to outweigh temptation.[94] The Canadian government, considering an injunction too innocuous to worry anyone contemplating breach of the underlying legislation, omitted provisions therefor from its price control program.[95] But United States experience indicates that the injunction is not always a futile weapon. The disgrace of being branded a law-breaker is sufficient to make most reputable concerns wary of risking its application, although the stigma apparently diminishes in later stages of large-scale programs as injunctive decrees be-

---

tory language of a statute addressed to all inhabitants. . . . He knows that the eye of the state is watching him . . ." *Ibid.*

93. See note 78 *supra.* The element of unpredicatability seems important. Here, as in estimating the likelihood of detection, the enjoined presumably will be prone to exaggerate unless actually familiar with cases where violators escaped with minor penalties.

94. Even where criminal sanctions are imposed, sentences are frequently inadequate to deter violations which might reap bonanza profits. Convinced that "only jail sentences are effective as a deterrent in these more serious cases," the OPA complained that "the fact that offenders . . . are often respectable men engaged in pursuing their self-interest in ways which might not be forbidden in times of peace, has created an atmosphere which tends to leniency." 13 OPA Q. REP. 68 (1945). During the fiscal year 1946, 72.7% of the 3,694 OPA criminal defendants were convicted; 39.4% were merely fined, while 21.0% were placed on probation and received suspended sentences. Of the 12.3% imprisoned, more than half (6.2%) received sentences of less than six months, and only 1.4% drew sentences longer than a year and a day. ANN. REP. DIR. ADM. OFF. U.S. COURTS 120 (1946). Most of the longer prison terms were meted out for offenses such as theft of ration coupons. 13 OPA Q. REP. 68 (1945). But even these criminals often "escaped with nothing more than a fine—a most reasonable license fee for engaging in such a lucrative racket." DUHL, *op. cit. supra* note 51.

Where the violator was a corporation and no responsible officers could be convicted, the OPA generally preferred treble damages to criminal fines for flagrant violations because the penalties were potentially much higher. OPA MANUAL § 9-1702.04B(2) (1946). In many instances, however, "treble damage actions were ineffective . . . because of the impossibility of ascertaining the full amount of the violation." DUHL, *op. cit. supra* note 51. License or rationing suspension was often more effective.

And in some situations a court might enjoin responsible officers, although the corporate shield protected them from criminal prosecution, with subsequent violation leading to conviction for contempt. See, *e.g.,* cases cited notes 78 and 81 *supra.*

95. Enforcement was left almost entirely to criminal prosecution. See P.C. 8528 (1941), as amended, and Willis, *Canada's Wartime Administrative Agencies,* 12 GEO. WASH. L. REV. 141, 161 (1944). Conversations of OPA officials with their British counterparts indicated that the latter could see no reason for a court order prohibiting practices already barred by statute. Communication from Thomas I. Emerson, *supra* note 67.

come more common.[96] In addition, respect for the devious mysteries of "the law" may give laymen a magnified conception of the injunction's severity,[97] particularly when contempt citations are numerous. Widespread use of the sanction should also encourage the compliance of concerns similar to those enjoined, by reducing the feeling of immunity and competitive pressure to violate which arise from failure to penalize breaches of a statute. This corrective value is maximized by attacking prevalent types of infraction, while enjoining a widely respected concern is especially useful to publicize an enforcement campaign and show that leaders in an industry are not exempt.[98] So used, the injunction may be substantially effective in deterring essentially law-abiding citizens and in lessening negligent violation.[99]

Role in the Enforcement Arsenal

Since the statutory injunction is not a panacea for all enforcement ills, an administrator must determine in each situation whether the remedy's availability and effectiveness make it his most appropriate weapon [100] in view of the relative culpability of the violation and the varying nature of the agency's program.

---

96. "Contrary to some opinion, the injunction has a substantial deterrent effect upon others. Especially among commercial establishments which boast a reputation for law-observance and respectability, there is a healthy respect for this sanction." OPA MANUAL § 9-6602.09 (1946). However, as the number of injunctions increases, . . . the impact of the sanction seems to lessen. . . . [Moreover,] injunctions in the early stages of an enforcement program are likely to receive more publicity than in the later stages." Communication from Thomas I. Emerson, *supra* note 67. Because it engenders little publicity and carries less stigma, the consent decree should have less deterrent effect than a contested injunction.

97. As with the enjoined's fear of contempt penalties, however, public overestimation of the injunction's severity may diminish if knowledge spreads that it can be violated with impunity.

98. "By and large we should concentrate on the most flagrant or persistent cases as the most direct means of getting a whole industry into line. . . . We should attempt to discover who are the leading violators in an industry and go after them hard. . . . Other things being equal, action against the larger firms will have the greater effect. . . . Of course this does not mean that we should take action against any firm merely because of its size." Memorandum to OPA Regional Administrators from Chester Bowles, Jan. 31, 1945. In some instances, such an injunction may promote added support for enforcement by inspiring a trade association to denounce the violative practice. See, *e.g.*, 18 OPA Q. REP. 75 (1946).

99. The OPA found, for example, that mere advance notice of intention to file injunction suits against all who failed to keep certain records was an effective method of increasing compliance, although in some cases it was necessary to carry out the threat. Communication from Thomas I. Emerson, *supra* note 67.

100. Only in one instance is an agency deprived of discretionary power to choose between its authorized sanctions: the NLRB is *required* to seek a temporary injunction when it has "reason to believe" that jurisdictional strikes or secondary boycotts exist. 29 U.S.C.A. § 160*(l)* (Supp. 1947). This requirement does not apply in other types of unfair labor practices. § 160*(j)*.

A few specialized remedies, such as the SEC stop-order, Food and Drug condemna-

Choosing the weapon.

The injunction is the only workable remedy for some types of violation. No other weapon can halt state court proceedings [101] or forestall threatened but unconsummated offenses,[102] and rarely is there any substitute for temporary injunctive relief where a violative practice can be killed by enforced interruption.[103] Necessary restitution, or appointment of an equity receiver, moreover, may be obtained only through an injunction when the agency has no statutory authority to seek them directly.[104]

Where alternative sanctions are also possible, the propriety of an injunction depends largely on the relative culpability of the violation.[105] The

---

tion proceedings, and OPA rationing suspension (see OPA MANUAL § 9-1905.01 (1945)), are almost sure to be selected in preference to an injunction where both are applicable. But the choice between other sanctions usually depends on the particular fact situation.

101. Generally a federal district court has no jurisdiction to stay proceedings in a state court, JUD. CODE § 265, 28 U.S.C. § 379 (1940), but the Supreme Court, by construing 50 U.S.C. APP. § 925(a) (OPA) as an implied amendment thereto, permitted the OPA to obtain a federal injunction restraining eviction of tenants under a state court order, Porter v. Dicken, 328 U.S. 252 (1946), or restoring the evicted tenant to his lodgings, Porter v. Lee, 328 U.S. 246 (1946). An injunction may also issue against prosecution in a state court of suits to enjoin enforcement of a federal regulatory statute under which state courts have no jurisdiction, Western Fruit Growers v. United States, 124 F.2d 381 (C.C.A. 9th 1941) (Market Administrator).

102. *See, e.g.,* United States v. 184 Barrels Dried Whole Eggs, 53 F. Supp. 652, 653 (E.D. Wis. 1943). See note 52 *supra.*

103. *E.g.,* FTC v. Thomsen-King, 109 F.2d 516 (C.C.A. 7th 1940): defendants were found to be fleecing the public through misleading advertisements of a contest which would be completed before a "cease and desist" order could have been issued. The temporary injunction halted the contest beyond redemption. Only SEC stop-orders and Food and Drug condemnation can operate as promptly.

The difficulty of reviving a strike after interruption by judicial mandate, *cf.* FRANKFURTER AND GREENE, THE LABOR INJUNCTION 201 (1930), may make temporary injunctions under the Taft-Hartley Act almost as lethal, shedding grave doubt on the desirability of that act's unusual provision for an injunction when there is merely "reason to believe" that an unfair labor practice exists. See note 11 *supra.*

104. See note 57 *supra.* Restitution is most important to the Wage and Hour Division, which possesses no direct authority to collect damages of any kind. See note 123 *infra.* It also proved valuable to the OPA where rent violations extended back beyond the one-year period of limitation for treble damages. See OPA MANUAL § 9-6602.07 (1946). More useful to the SEC has been adjunctive appointment of equity receivers to insure that clients of insolvent firms are treated fairly. Although specifically authorized only by the Investment Companies Act, 15 U.S.C. § 80a-42(e), this relief may be granted as ancillary to an injunction under other SEC statutes. *Cf.* Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) (suit under Securities Act).

105. DUHL, *op. cit. supra* note 51, grouped violators into five categories, each of which required different sanction policies: (1) profiteers who desired to make a "killing"; (2) sellers squeezed between established prices and increasing costs; (3) those ignorant of or failing to understand the regulations; (4) those who neglected to provide adequate safeguards or mechanisms to insure compliance; (5) inadvertent violators who could not prevent infractions despite all practicable precautions.

Regardless of the degree of culpability, the injunction is often preferred in "test

weapon is best suited for application to negligent malfeasors whose future compliance may be stimulated by a judicial mandate, and in such instances it may replace administrative remedies, such as license revocation, which are unduly severe for minor violations.[103] An injunction is frequently invoked, however, in cases lying beyond this optimum range. While informal settlement usually suffices if an unintentional violator is trusted to avoid further offenses, the agency may nevertheless seek an injunction with the primary aim of deterring others in the industry.[107] In addition, the difficulty of obtaining criminal conviction even of intentional violators may lead the Administrator, in all but flagrant cases, to settle for an injunction along with treble damages, restitution, or license revocation.[108]

In many instances where other sanctions are necessary, the injunction may still be valuable as an auxiliary weapon. The combination of future prohibition with damages for past violations counteracts weaknesses of both remedies: the sting of punishment is added to the injunction, and the danger that damages may become merely a "cost of doing business" is minimized by the potentiality of imprisonment for contempt if the injunctive decree is violated.[109] A temporary injunction can provide useful interim relief where other sanctions involve delay.[110] And although a permanent injunction and

---

cases" to obtain judicial interpretation. See pp. 1022-3 *infra*. It is understood that the SEC prefers administrative sanctions in such cases because there is greater prospect of a favorable initial outcome and the reviewing court may accord deference to the agency's decision. That such benefits do not always accrue is evidenced by the OPA's record of success in rationing suspension proceedings (89.8%) in comparison with injunctive actions (98.8%). And see the statistics on disciplinary proceedings in 13 SEC ANN. REP. 226, 228 (1947). But the greater severity of the administrative sanctions may account for this disparity.

106. See Att'y Gen. Comm. Ad. Proc. *SEC*, SEN. DOC. No. 10, PART 13, 77th Cong., 1st Sess. 8 (1941). And the OPA seldom sought license suspension in such cases because, although "remedial" from the agency's viewpoint, "it has a serious punitive effect upon the licensee." OPA MANUAL § 9-1803.02 (1946).

107. See, for example, the agency's argument in Fleming v. Phipps, 35 F. Supp. 627 (D. Md. 1940) (*supra* note 64). But the court almost always denies an injunction, as in the *Phipps* case, unless it finds that there is some doubt as to the defendant's future compliance.

108. In selecting cases for criminal action, the OPA applied an exhaustive list of practical standards, including intangibles such as "psychological atmosphere". OPA MANUAL § 9-1702 (1946). Stringent selectivity is particularly important in mass enforcement (see note 112 *infra*), but no agency program is enhanced by a string of acquittals.

109. See Ross, *Inflation Control: The Enforcement Job*, 5 LAW. GUILD REV. 356, 360 (1945). The OPA customarily utilized this combination. OPA MANUAL § 9-6602.11 (1946).

110. See, *e.g.*, note 60 *supra*. In one situation, moreover, the injunction facilitates application of another remedy: under 15 U.S.C. § 780(b), issuance of an injunction is grounds for SEC revocation of the defendant broker-dealer's license. The combination is useful where an activity warranting revocation must be halted promptly, but since July 1939, only 40 revocation proceedings have been instituted primarily on this ground. 13 SEC ANN. REP. 226 (1947).

Under the Investment Advisers Act, 15 U.S.C. § 80b-3(d), the injunction performs a

criminal penalties are usually regarded as alternatives, the SEC occasionally seeks the former as a prelude to prosecution.[111]

Utility as a mass enforcement weapon.

The qualities which make the statutory injunction a valuable enforcement weapon are accentuated in a mass enforcement program such as price control because of the relatively light burden which the remedy places on court and agency. In contrast with severe sanctions such as criminal prosecution, which must be carefully restricted to avoid swamping jury calendars,[112] the injunction may be handled expeditiously and encourages consent decrees.[113] It also takes a lighter toll of investigative as well as litigative facilities, an important factor since enforcement staffs are generally undermanned.[114]

Another major advantage of the injunction is its value as a vehicle for educational litigation. During early stages of enforcement an agency needs prompt judicial interpretation of the statute to define its own powers and clarify the requirements of compliance for those subject to the program.[115]

---

more essential role as one of the three alternative prerequisites (along with criminal conviction or willful misstatement) to revocation.

111. *E.g.*, SEC v. Woodman, S.E.C. Litig. Release No. 216 (unreported; D. Mass. 1944) (permanent injunction), followed by United States v. Woodman, S.E.C. Litig. Release No. 306 (unreported; D. Mass. 1945) (criminal conviction for same violation). Interviews with officials of other agencies reveal that such a combination, although valuable as a continuing mandate, is normally frowned on because of added consumption of limited litigation facilities and danger that the government's case for criminal prosecution may be prematurely revealed in the injunctive hearing.

112. Because of this danger the OPA decreed that "no prosecution should be recommended unless the case has clear significance for enforcement beyond the administering of deserved punishment." OPA MANUAL § 9–1702.02 (1946).

113. In 1944 only 3.0% of the OPA's civil cases reached trial; in 1945 the figure was 2.2%, while consent decrees accounted for 79.6% of the total. See note 42 *supra*. ANN. REP. DIR. ADM. OFF. U.S. COURTS 47, 51 (1945).

114. One reason why the OPA relied so heavily on the injunction was that "investigations laying a basis for criminal or treble damage proceedings required far more time and resources." Communication from Thomas I. Emerson, *supra* note 67.

115. For the period immediately after a statute goes into effect, there is comparatively little litigation. An educational program is far more important, and fledgling staffs are inadequate to pursue both activities extensively. See 1 W. & H. ANN. REP. 61 (1939) and 2 OPA Q. REP. 54–5 (1942). A large proportion of the limited enforcement facilities are directed at blatantly willful violators, who must be punished to prevent disregard of the statute; injunctive actions are instituted primarily to obtain judicial interpretation or in key cases having wide deterrent effect. As a result, the excess of injunctive over criminal actions is small. In the second quarter of 1942 the OPA initiated 45 of the former as compared to 33 of the latter. *Ibid.* But attempts to "cut corners" soon become more common than flagrant violations, and injunctions are well suited to check "widespread violations arising out of ignorance, inertia, or expectancy of non-enforcement"; in addition, techniques for widespread application of the sanction (see note 95 *supra*) are developed. Communication from Thomas I. Emerson, *supra* note 67. The extent to which injunctions outstrip criminal prosecution is indicated by ANN. REP. W. & H. DIV. 95

In this quest the agency is less hampered by the injunction's relatively light burden of proof. The possibility that judicial interpretation may be colored by feeling against "bureaucracy" is minimized by the remedy's mildness, which is especially appropriate where the statute is unfamiliar and where public as well as judicial confidence in the agency's fairness must be fostered.[116] At the the same time the injunction carries a stigma severe enough to counsel compliance, and the frequency with which it may be obtained in key cases gives it a total deterrent value equal to that of more severe sanctions which are less frequently available.[117]

As a program matures beyond its educational phase, the injunction declines in importance. Sanctions instilling greater fear of punishment should be relatively easier to obtain than previously,[118] for increased familiarity with the statute limits the defense that violations were unintentional, and improving techniques of investigation can better support the heavier burden of proof. These sanctions also become more necessary to deter violations when extensive use of the injunction begins to reduce its accompanying stigma.[119] In combination with treble damages or restitution, however, the

(1940), 52 (1941):

Actions Instituted:	Nov. '38–Dec. '39	Nov. '38–June '40	July '40–June '41
Injunctive:	83 (57%)	403 (78%)	1689 (97%)
Criminal:	63 (43%)	113 (22%)	60 (3%)

116. Even in 1945 this remained a problem for OPA. Reiterating that "we do not wish to create the impression that we are enforcing for the sake of enforcement," the Administrator added: "With a new regulation it may be advisable to wait until [educational] compliance measures have had a chance to operate." Memorandum to Regional Administrators from Chester Bowles, Jan. 31, 1945.

117. In key cases criminal prosecution is seldom successful, for "such violators are often not 'criminals' in the usual sense. Rather, the selection of key cases will often involve action against what have hitherto been some of the most respectable members of an industry." The frequency with which injunctions may be obtained is also important, for "in some situations quantity may be important in itself . . . in making an impression on the industry and the public." *Ibid.*

118. For example, OPA's record of success in actions for severe sanctions improved markedly in 1945 over that of 1944 (statistics obtained from National Archives):

Percent won, of cases decided in:	1944	1945
Injunction:	98.0% of 10,693	97.7% of 22,900
Adm'r's Own Treble Damage Suits:	90.9% of 674	97.4% of 2,620
Adm'r's Consumer Treble Damage:	91.4% of 162	97.3% of 5,438
License Suspension:	94.5% of 55	94.8% of 134
Criminal:	92.1% of 4,513	94.1% of 3,663

119. The histories of both the Wage and Hour Division and OPA indicate the extent to which more severe sanctions are invoked. See ANN. REP. W. & H. DIV. 12 (1944), 26 (1946) and 9 (1947):

Fiscal Year:	1942	1943	1944	1945	1946	1947
Injunctions instituted:	1203 (92%)	493 (91%)	347 (89%)	371 (90%)	281 (69%)	260 (63%)
Criminal cases instituted:	111 (8%)	51 (9%)	41 (11%)	39 (10%)	126 (31%)	155 (37%)

The abrupt shift in 1946 appears to indicate a drastic change in the agency's sanction

injunction retains a significant role because of its ready availability and the value of a continuing mandate of compliance.[120]

CONCLUSION

The ease and speed with which a statutory injunction may be obtained, in contrast with the relative difficulty of invoking other sanctions, have been vital factors in the success of agency enforcement programs. Similarly, its preventive nature and inherent mildness have made it a valuable alternative to harsher weapons. While the battle-cry of "government by injunction" still carries unpleasant implications, the public has acquiesced in the use of the remedy to enforce regulatory statutes.[121]

---

policy. Perhaps a percentage of violations were willful because of increased familiarity with the statute, or the end of the war may have permitted reinspection of establishments previously warned and again found in violation—no authoritative explanation is obtainable. But these reasons would all spring from the program's increased maturity, and the change seems too sharp to be entirely fortuitous.

While decreasing budget allotments reduced Wage and Hour litigation, the number of OPA cases (until decontrol began in 1946) soared as investigative techniques developed. See the following OPA Q. REPS.: 8 at 71, 12 at 75, 17 at 104, 18 at 82, 19 at 95, and 20 at 83 (percentages are of total civil sanctions instituted):

	1943	1944	1945	1946
Injunctions:	4,516 (85.6%)	16,649 (76.1%)	33,756 (67.6%)	21,650 (58.3%)
Total Treb. Dmg. Suits:	751 (14.3%)	5,027 (23%)	15,867 (31.8%)	15,062 (40.3%)
License Suspension:	6 (0.1%)	190 (0.9%)	307 (0.6%)	525 (1.4%)
Total Civil Sanctions (predominantly price):	5,273	21,866	49,930	37,337
Total Criminal Suits (Price & Rationing):	3,664	4,814	4,038	1,688
Rationing Suspensions:	10,132	12,171	18,012	10,675

Correlation of criminal with injunctive statistics is prevented by two factors: (1) the number of criminal actions necessarily remained limited (see note 112 *supra*); (2) a preponderant number of these actions involved rationing violations, for which the alternative sanction was usually rationing suspension rather than injunction (see notes 94 and 100 *supra*). But the trend toward heavier civil sanctions for price violations was pronounced.

120. See note 109 *supra*. The injunction is still used alone "to prevent more subtle types of violation taking the form of evasions, . . . to test interpretations, and for similar purposes." Communication from Thomas I. Emerson, *supra* note 67.

Perhaps this change in the type of violation against which injunctions are invoked, along with more stringent agency terms for settlement (see OPA MANUAL § 9-6602.08 (1946)), operates to increase the percentage of cases contested in later stage of enforcement. The Wage and Hour Division's experience shows a particularly steady trend, ANN. REPS. W. & H. DIV. 11(1942), 12(1944), and 26(1946):

Fiscal year:	1942	1943	1944	1945	1946
Instituted:	1,203	493	347	371	281
Contested:	31 (2.6%)	74 (15.0%)	77 (22.2%)	106 (28.6%)	136 (48.4%)

121. Although objections are still heard from those who might be immune to prosecu-

Admittedly, the injunctive process is not innocuous or incapable of abuse. Unnecessary injunctions should be avoided, since the stigma accompanying judicial prohibition injures even a defendant who thereafter complies with the statute. The possibility of contempt proceedings counsels against decrees broader than are necessary to prevent evasion. Less valid as a cause for concern has been the modification of equity shibboleths—a development which was necessary to convert the injunction into an effective enforcement weapon. Judicial discretion, however, can cope with all three of these dangers: it provides a bulwark against abuse, and duplicates the justifiable protective function of the traditional requirements without preserving their obstructive rigidity. An added precaution, legislative provision for a jury trial in contempt proceedings,[122] would appear highly desirable in view of the frequency with which a statutory injunction is used as an alternative to criminal prosecution. But in other respects no drastic amendment appears necessary. Courts have usually managed to strike a reasonably sound balance between those perpetual antagonists, private right and public interest.

The shortcomings of the injunction are seldom those of overseverity, for no formal sanction is less onerous. They lie rather in its inadequacy to deter hardened violators, and in the difficulty of insuring compliance with its terms. The former deficiency may be buttressed by combination with heavier sanctions such as treble damages. The latter must be countered by reserving sufficient facilities for reinvestigation, even at the expense of important initial coverage. Only where Congress provides adequate alternative sanctions and sufficient investigative facilities can the potential of the injunction be fully realized.[123]

---

tion but are fair game for an injunction, there is nothing approaching the barrage of criticism formerly directed at injunctions against labor unions or Prohibition violators. See, for example, Dunbar, *Government by Injunction*, 13 LAW Q. REV. 347, 355 *et seq.* (1897) (unions); Black, *The Expansion of Criminal Equity Under Prohibition*, 5 WIS. L. REV. 412 (1930); Comment, 20 COL. L. REV. 605 (1920) ("Red Light" districts). These authors justifiably objected to the consequent avoidance of jury trial, and feared that legislatures might unduly expand the venerable concept of "public nuisance." See note 4 *supra*.

Current public acquiescence seems to stem from a number of factors: (1) greater public approval of these regulatory statutes; (2) recognition that they must be enforced against minor violators; (3) limitation by courts on the scope of decrees; (4) the relative infrequency of contempt proceedings and the rarity of excessive penalties therein.

122. A few statutes already provide jury trial for criminal contempt. *E.g.*, Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 332b; Clayton Act, 28 U.S.C. § 387 (inapplicable to suits brought by agencies on behalf of U.S.). Such provisions should remove the major objection to enforcement by injunction. See note 121 *supra*. It may be, as was contended in *In re* Debs, 158 U.S. 564, 595 (1895), that "to submit the question of disobedience to another tribunal, be it jury or another court, would operate to deprive the proceeding of half its efficiency." But it seems unwise to disregard the possibility that "efficiency" may occasionally flourish at the expense of justice. The statutory injunction is too valuable a weapon to risk its discredit as a mere device for escaping jury trial, and "a certain amount of effectiveness may well be sacrificed in order that public confidence and trust in our courts may not be lost." Caldwell, *supra* note 5 at 231. See Comment, 57 YALE L. J. 83, 97 (1947).

123. Currently the chief victim of Congressional neglect seems to be the Wage and

Despite its shortcomings, the statutory injunction is a highly valuable weapon which during the past fifteen years has proved its right to a major role in the enforcement arsenal of federal administrative agencies.

Hour Division. Its investigative staff is extremely small in relation to the size of its program. See note 67 *supra*. It cannot bring a civil action to collect back wages for employees except through restitution, which may be barred in many instances; see note 57 *supra*. See also ANN. REP. W. & H. DIV. 65 (1946): "In the overwhelming majority of cases . . . employees do not bring suit. . . . At present employers have little inducement to pay wages found due on inspection. . . . The knowledge by employers that the Administrator could bring suit for recovery would lead to voluntary restitution in the overwhelming majority of instances." Certainly the OPA's experience with treble damage suits would seem to justify this claim.